BANK SIMPANAN NASIONAL v. THAM LAI LING

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[APPEAL NO: 12ANCC-55-07-2015]
27 APRIL 2016

CIVIL PROCEDURE: *Action – Limitation period – Action for recovery of shortfall after sale of charged property – Whether accrued from date of default – Whether claim instituted within applicable limitation period – Whether exceeded six year limitation period – Whether claim time barred – Whether action ought to be struck out – Rules of Court 2012, O. 18 r. 19 – Limitation Act 1953, ss. 6 & 21*

CIVIL PROCEDURE: *Action – Cause of action – Accrual of – Action for recovery of shortfall after sale of charged property – Whether accrued from date of default – Whether claim instituted within applicable limitation period – Whether exceeded six year limitation period – Whether claim time barred – Whether action ought to be struck out – Rules of Court 2012, O. 18 r. 19 – Limitation Act 1953, ss. 6 & 21*

CIVIL PROCEDURE: *Striking out – Appeal against – Action for recovery of shortfall after sale of charged property – Whether accrued from date of default – Whether claim instituted within applicable limitation period – Whether exceeded six year limitation period – Whether claim time barred – Whether action ought to be struck out – Rules of Court 2012, O. 18 r. 19 – Limitation Act 1953, ss. 6 & 21*

On 24 October 1990, the appellant granted a housing loan to the respondent, enabling the latter to purchase a property ('the said property') which facility was secured by way of a loan agreement cum assignment executed on 5 April 1991 ('LACA'). Following a default by the respondent, the appellant issued a letter of demand dated 19 October 2001, claiming for the payment of the outstanding debt. Given the continued failure of the respondent to settle the demand, the appellant filed an originating summons on 16 August 2002 for an order for sale of the said property. Following the availability of a separate title, the appellant thus arranged for a land charge to be created in its favour. Subsequently, the appellant issued a demand notice dated 13 August 2012. The appellant then pursued foreclosure proceedings of the said property and succeeded in selling the same by public auction on 21 November 2013. As the proceeds of the sale could not fully settle the outstanding debt, the appellant proceeded to issue another letter of demand on 23 January 2015 to recover the shortfall. As the respondent failed to pay the shortfall, the appellant initiated a writ action on 27 March 2015 at the Sessions Court for recovery of the said shortfall. The Sessions Court struck out the appellant's claim under O. 18 r. 19 of the Rules of the Court 2012 on the ground that the action was time barred under ss. 6 and 21 of the Limitation Act 1953. Hence, the present appeal. The appellant submitted, *inter alia*, that because

A the earliest date for the appellant to initiate the writ action was necessarily subsequent to the completion of the foreclosure proceedings which had concluded with the auction on 21 November 2013, its writ which had been filed on 27 March 2015 would therefore be well within the stipulated time. The respondent, on the other hand, contended that a cause of action
B commenced upon demand being made, which would thus be evidenced by the letter on 19 October 2001. According to the respondent, this would mean that by the time foreclosure proceedings commenced, more than six years had elapsed in respect of the claim in contract and more than 12 years had elapsed in connection with the claim for a charge action, and would therefore
C be barred by ss. 6 and 21 respectively.

Held (dismissing appeal):

(1) The usual clause found in the charge annexure on the right of the charge to any difference in shortfall following a successful order for sale merely creates a right to recover any balance outstanding. It is not an agreement
D to postpone its right to being an action *in personam* for the recovery of the whole sum lent together with interest until after the charged land had been sold (*Chan Boi Loi v. Public Bank Bhd & Another Application*). Thus, in the instant appeal, cl.19 of the charge annexure could not have the effect of conferring on the appellant an independent or a new cause of
E action to recover the shortfall. It merely provides for the right of the appellant to claim for the shortfall which must, at any rate, be pursued by instituting a claim within the applicable limitation period. The cause of action to sue for the debt would have accrued on 19 October 2001, based on the evidence of the letter of demand and the filing of this action
F to claim the shortfall was done on 27 March 2015, which was some seven years beyond the six year limitation period prescribed by statute. (paras 14 & 18)

(2) The position in law is that there is no fresh cause of action available to the charge to claim the recovery of any shortfall after the sale of the
G charged property. It could not be denied that the bank certainly has the right to recover the shortfall but that right of recovery *in personam* accrues from the date of default and thus subject to the applicable limitation period, which is six years under s. 6 of the Limitation Act 1953. Separately, the foreclosure proceedings, being an *in rem* action,
H was subject to s. 21 of the Act which barred any order for sale beyond the limit of 12 years, also from the date of default. The cause of action for both the claim for the outstanding loan and the foreclosure proceedings commenced from the date of default. (para 19)

(3) The focus of this appeal was the subsequent claim for the shortfall. The
I cause of action to initiate such a claim commences from the default of the borrower to remedy a demand and was not postponed until after foreclosure action had been taken. Since the date of the first letter of

demand unremedied by the respondent borrower in evidence was 19 October 2001, the action filed in the Sessions Court on 27 March 2015 to recover the shortfall post auction was therefore far exceeding the six year limitation period and was consequentially plainly time barred. The appellant's action must necessarily fail. (para 29)

(4) A claim which is statute barred is an established ground for striking out on the basis of it being frivolous, vexatious and an abuse of the process of the court. It is settled law that for cases impaired and barred by the Limitation Act 1953 such as the present case, the test of the pleading being on the face of it 'obviously unsustainable' would readily be fulfilled. Thus, the action filed by the appellant in the instant case had been correctly struck out by the Sessions Court. The respondent had successfully, on a balance of probabilities, proved his case to have the action filed by the appellant for recovery of the balance outstanding to be struck out under O. 18 r. 19 of the Rules of Court 2012. (paras 30 & 31)

Case(s) referred to:

Alliance Bank Malaysia Bhd lwn. Loh Hong Koon [2013] 1 LNS 596 HC ***(refd)***
Ambank (M) Bhd v. Jayabhalan Ramachandran [2013] 2 CLJ 776 HC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Bank of Tokyo-Mitsubishi (Malaysia) Bhd lwn. Chong Suan Kit & Satu Lagi [2005] 1 LNS 422 HC ***(refd)***
BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 CLJ 599 CA ***(refd)***
Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***
Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(refd)***
CIMB Bank Bhd v. Spectrum Crest Sdn Bhd & Anor [2011] 1 LNS 46 HC ***(refd)***
Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 HC ***(refd)***
Jigarlal K Doshi v. Resolution Alliance Sdn Bhd & Another Appeal [2012] 1 LNS 811 CA ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC ***(refd)***
Malayan Banking Bhd v. Zahari Ahmad [1987] 1 LNS 136 HC ***(refd)***
Peh Lai Huat v. MBf Finance Bhd [2009] 5 CLJ 69 CA ***(refd)***
Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC ***(refd)***
Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***
Tasja Sdn Bhd v. Golden Approach Sdn Bhd [2011] 3 CLJ 751 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Limitation Act 1953, ss. 4, 6(5), 21(1)
National Land Code, s. 256
Rules of Court 2012, O. 18 r. 19
Rules of the High Court 1980, O. 83

A *For the appellant - Azali Johari; M/s Paizah & Nazira*
For the respondent - Francis Brigged; M/s Francis Brigged & Co

Reported by Suhainah Wahiduddin

B

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an appeal against the decision of the Sessions Court which had
C pursuant to O. 18 r. 19 of the Rules of Court 2012 struck out the claim filed by the appellant herein (the plaintiff in the court below) for the recovery of the outstanding amount pursuant to a loan granted by the appellant bank to the respondent borrower.

[2] After having heard the appeal, I delivered my decision dismissing the
D same (with the broad grounds in support thereof) on 3 February 2016. This judgment, which contains the full reasons for my decision, discusses the law concerning the application of the limitation period to actions seeking to recover shortfall in indebtedness following foreclosure proceedings.

Key Background Facts

E

[3] The facts may be briefly stated in chronological fashion as follows:

(i) the appellant on 24 October 1990 granted a housing loan of RM117,000 to the respondent, enabling the latter to purchase a property ("the said property"), which facility was secured by way of
F a loan agreement cum assignment executed on 5 April 1991 ("LACA");

(ii) following a default by the respondent, the appellant, through its solicitors, issued a letter of demand dated 19 October 2001 claiming for the payment of the outstanding debt as of 17 October 2001 which
G amounted to RM215,749.55;

(iii) as the default persisted, the appellant, through its solicitors on 5 December 2001 issued another letter demanding payment, for the amount of RM275,210.42, stated to be outstanding as of 5 November 2001;

H

(iv) given the continued failure of the respondent to settle the demand, the appellant filed an originating summons on 16 August 2002 for an order for sale of the said property;

(v) the appellant however withdrew the originating summons on
I 13 March 2003 after having been informed that separate strata title for the said property had been issued;

(vi) following the availability of separate title, the appellant thus arranged for a land charge to be created in its favour. The land charge (and its annexure) in respect of the said property was dated 27 April 2012. It is to be observed that this was close to ten years after the withdrawal of the application for an order for sale;

(vii) subsequently, the appellant, through its solicitors issued a demand notice dated 13 August 2012, claiming the amount of RM532,419.49 as of 31 July 2012;

(viii) the appellant then pursued foreclosure proceedings of the said property and succeeded in selling the same by public auction on 21 November 2013 at RM230,000;

(ix) as the proceeds of the sale could not fully settle the outstanding debt, the appellant proceeded to issue another letter of demand through its solicitors on 23 January 2015 to recover the shortfall of RM330,725.36 as of 14 January 2015;

(x) given the failure of the respondent to pay the difference, the appellant initiated a writ action on 27 March 2015 at the Sessions Court for recovery of the said shortfall; and

(xi) the Sessions Court struck out the claim under O. 18 r. 19 of the Rules of Court 2012 on the ground that the action was time barred under ss. 6 and 21 of the Limitation Act 1953. Hence this appeal.

Summary Of Contentions By Parties

[4] The principal issue for consideration previously at the Sessions Court and presently before this High Court is whether the claim by the appellant for the shortfall is barred by the Limitation Act 1953. The Sessions Court, as mentioned earlier, ruled in the affirmative, in holding that the claim should as a result be struck out.

[5] The appellant formulated the argument that as a chargee, it had two causes of action against the respondent borrower and chargor. The first was in respect of the foreclosure proceedings which sought to and did manage to dispose of the said property, and the second was the writ action to demand the outstanding debt still remaining (the shortfall) after the auction.

[6] The appellant submitted that the issue of limitation would be irrelevant to the first mentioned cause of action since the respondent did not plead nor raise the same during the foreclosure proceedings. Section 4 of the Limitation Act 1953 so clearly provides that limitation must be expressly pleaded as a defence in order to be effective. It states as follows:

> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[7] As for the second cause of action concerning the writ claim, the appellant contended that it had 12 years to commence the action pursuant to ss. 6(5) and 21(1) of the Limitation Act 1953 because the action concerned recovery of loan secured by a mortgage or charge on land. The relevant parts of these statutory provisions are reproduced hereunder:

Section 6

(5) Nothing in this section shall apply to:

(a) any cause of action within the Admiralty jurisdiction of the High Court which is enforceable *in rem* other than an action to recover the wages of seamen, or

(b) any action to recover money secured by any mortgage of or charge on land or personal property.

Section 21

(1) No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.

[8] Furthermore, because the earliest date for the appellant to initiate the writ action (to determine if there was any shortfall to be pursued) was necessarily subsequent to the completion of the foreclosure proceedings which had concluded with the auction on 21 November 2013, its writ which had been filed on 27 March 2013 would therefore be well within the stipulated time.

[9] The respondent on the other hand, contended that a cause of action commences upon demand being made, which would thus be evidenced by the letter of 19 October 2001. This would mean that by the time foreclosure proceedings were finally commenced (in 2013), more than six years had elapsed in respect of the claim in contract and more than 12 years had elapsed in connection with the claim for a charge action, and thus would be barred by ss. 6 and 21 respectively. The Sessions Court was clearly correct in striking out the claim as not only had limitation set in by the time the suit was filed, but there was also inordinate delay on the part of the appellant in exercising its rights under the LACA.

Evaluation And Findings By This Court

[10] The appellant relied on the Federal Court's decision of *Tan Kong Min v. Malaysian Nasional Insurance Sdn Bhd* [2005] 3 CLJ 825; [2005] 4 AMR 745 as the authority for the proposition that the cause of action to recover any shortfall despite a foreclosure would start to run upon the disposal of the property. The Federal Court held as follows:

[24] In the circumstances of the present appeal before us, we are of the view that the point in time where all the material facts are said to be in existence to render the cause of action complete would be after the sale has been conducted and the differential amount remaining due to the respondent has been ascertained.

[25] Therefore, the earliest possible date the respondent could **bring an action against the appellant for breach of his personal covenant** under clause 7 is on March 16, 1992, **being the date the property was sold by auction.**

[26] Since the respondent's cause of action arose on March 16, 1992, their action against the appellant which was filed on January 17, 1995, was filed well within the time prescribed in s. 21(1) of the Act ie, twelve (12) years. [emphasis added]

[11] However, the Federal Court in a subsequent decision in *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81 made it clear that *Tan Kong Min* did not refer to the Supreme Court's decision of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 which had already established that a chargee or creditor may at its option pursue all its remedies to recover monies lent by him either simultaneously, contemporaneously or successively, unless there is agreement to the contrary. Given the importance of the decision in *Chan Boi Loi*, it would be useful to reproduce the relevant parts of the judgment of Gopal Sri Ram JCA (as he then was) which discussed *Tan Kong Min* and clarified the point as to when the cause of action started to run with much lucidity, as follows:

Before we state our views on the correctness of the *ratio* in *Hong Kong & Shanghai Banking Corp v. Wan Mohd bin Wan Ngah* we must discuss the other authority relied upon by counsel for the applicants. It is *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825.

[5] In that case, the respondent insurance company had lent money to the appellant who had provided security for that loan by way of a registered charge over his land. The appellant defaulted in making payment of the loan. The insurance company then instituted foreclosure proceedings and had the land sold off at a public auction. But the monies it got from the sale were insufficient to satisfy the debt owed to it. So, it commenced an action to recover the shortfall. The appellant took the point that the action was barred by limitation. His failure to comply with that demand constituted a breach of the contract contained in the annexure to the charge. More than six years had passed since that breach. The lender could not therefore recover the shortfall. These arguments were rejected by this court which held *inter alia* that the relevant period of limitation was 12 years and not six years. It then made the following observations upon which the present applicants place much reliance:

At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realised from the sale of the said land only and the cause of action

A against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature.

B ...

As is the case here, where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of C recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance.

[6] In arriving at these conclusions, this court relied on the decision in D *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah* and the case of *Leong Yick Realty Co Sdn Bhd v. Asia Commercial Finance (M) Sdn Bhd* [1994] 2 CLJ 530 which followed it. However, the attention of this court was not drawn to the later decision in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 where this court held as follows:

E Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between F the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839 at p 842. (emphasis added.)

[7] It is clear from the statement of facts in *Tan Kong Min v. Malaysian* G *National Insurance Sdn Bhd* that the only points in the case that called for decision were (i) when the insurance company's cause of action to recover the shortfall arose and (ii) which period of limitation was to be applied, that is, the six years prescribed by s. 6 or the 12 years prescribed by s. 21 of the Limitation Act 1953. *The observation "where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out* H *in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge" is pure obiter dicta and not part of the ratio decidendi. It is not to be treated as binding authority.* At the risk of repetition, *Tan Kong Min* was an action to recover a shortfall that had occurred after the sale of the security. It was not an action for the recovery of a debt due from the borrower to the lender. As I for *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd bin Wan Ngah*, it was clearly overtaken by the decision of this court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* and must be now regarded as overruled. It is of interest

to note that Lamin PCA was a member of this court in *Low Lee Lian* and subscribed to a view that was at variance with that he had expressed in *Wan Mohd Wan Ngah*'s case.

[8] We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Such an agreement is not to be implied from a clause in an annexure to a charge in terms of cls. 8 and 16 in the present instance. *All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the instant respondent bank to postpone its right to bring an action in personam for the recovery of the whole sum lent (together with interest) until after the charged land has been sold. If the courts were to read such an agreement into the clauses in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law.* (emphasis added)

[12] Instead, *Tan Kong Min* relied on the decision in *Hong Kong & Shanghai Banking Corp Ltd v. Wan Mohd Wan Ngah* [1991] 1 CLJ 821; [1991] 2 CLJ (Rep) 732 where the High Court had held that a chargee must first proceed to realise its security and was not entitled to pursue its remedies concurrently. *Chan Boi Loi* thus overruled *Wan Mohd Wan Ngah*. *Chan Boi Loi* also distinguished *Tan Kong Min* and held that the statement in the latter that a chargee "is not entitled at law and in equity to proceed by way of a civil suit before first realising the security under the charge" as purely *obiter dicta*. It cannot be emphasised enough that the Federal Court in *Chan Boi Loi* so plainly stated that the proposition that the right of the bank to recover *in personam* arises only upon the sale of the charged property was fallacious.

[13] In the instant appeal however, the situation is substantially the same as in *Tan Kong Min*, as the appellant is seeking to recover a shortfall after foreclosure of the charged property. What then is the position in law on the right to recover the shortfall and on the applicable limitation period?

[14] It is beyond dispute that the answer to this question has been authoritatively given by the Federal Court in *Chan Boi Loi* which as I have highlighted earlier, ruled that the usual clause found in the charge annexure on the right of the chargee to any difference in shortfall following a successful order for sale merely creates a right to recover any balance outstanding. It is not an agreement to postpone its right to bring an action *in personam* for the recovery of the whole sum lent together with interest until after the charged land has been sold.

[15] Indeed the appellant highlighted the first part of the relevant cl. 19 of the charge annexure granted by the respondent, which reads as follows:

> Deficiency in Proceeds of Sale
>
> If the amount realized by the Bank pursuant to the proceedings referred to in Clause 17 hereof after the deductions thereof is less than the amount due and payable to the Bank and whether at such sale the Bank is the purchaser or otherwise, the Chargor shall pay to the Bank the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the prescribed Rate with monthly rests.

In light of *Chan Boi Loi* and *Low Lee Lian*, the contention that the appellant's cause of action to recover the shortfall arises upon the sale of the charged property which gives rise to the shortfall in the first place, which was after the differential sum has been ascertained, cannot therefore be deemed other than to be wholly unmeritorious.

[16] Further support for this conclusion may be readily found in a decision of the High Court in *Ambank (M) Bhd v. Jayabhalan Ramachandran* [2013] 2 CLJ 776; [2013] 2 MLRH 289, which relevant facts are similar to those in the instant appeal. It is instructive to note that the pertinent clause in the relevant loan agreement governing deficiency in sales proceeds in that case reads as follows:

> If the amount realised by the lender pursuant to the proceedings referred to in s. 11.03 hereof after the deductions thereof is less than the amount due and payable to the lender, the borrower shall pay to the lender the difference between the amount due and the amount so realised and until payment will also pay interest on such balance at the prescribed rate herein.

[17] After having reviewed local precedents, most notably *Chan Boi Loi* and *Tan Kong Min*, as well as a number of leading English authorities, the court ruled that the said clause did not create a new debt but only stipulated what was obviously stated, which was that the defendant would continue to be liable for any shortfall which may accrue post realisation of the said property. In that case, as the cause of action had accrued in February 1998 and based on the limitation period of 12 years, the second suit filed on 17 October 2011 was held to be time barred. Even though the default occurred in 1998, the plaintiff did not commence action until the first auction on 10 February 2009; some 11 years later. The court additionally held that in the circumstances of the case, and having particular regard to the undue and inordinate delay on the part of the plaintiff to realise the security by way of an auction sale and having commenced the second suit after 12 years from the default in February 1998 and in allowing the debt to balloon to more than RM1.1 million, the action in the second suit was also an abuse of process. It is also noteworthy that the High Court also held that given the overruling of *Wan Mohd Wan Ngah* by the Federal Court in *Chan Boi Loi*, the rationale

for the proposition that a fresh cause of action *in personam* for a shortfall arising only upon determining the amount after a successful auction must be taken to have been "impliedly overruled".

[18] Thus in the instant appeal, the clause as set out above similarly cannot have the effect of conferring on the appellant an independent or a new cause of action to recover the shortfall. It merely provides for the right of the appellant to claim for the shortfall which must at any rate be pursued by instituting a claim within the applicable limitation period. The cause of action to sue for the debt would have accrued on 19 October 2001, based on the evidence of the letter of demand (if not actually earlier) and the filing of this action to claim the shortfall was done on 27 March 2015, which would be some seven years beyond the six year limitation period prescribed by statute. It is also of note that the cl. 19 of the charge annexure highlighted by the appellant as I reproduced above was only half of the entire clause. The remaining and later part of cl. 19 actually states that the appellant would be at liberty to commence separate action for recovery before initiating foreclosure action to sell the charged property. For completeness I set hereunder the same:

> PROVIDED THAT nothing herein contained shall be construed as imposing any obligation (whether at law or in equity) upon the Bank to exhaust its remedy to sell the said Land before commencing any separate action or before enforcing any other remedies or exercising any other rights on the Chargor or the Guarantor. And the Chargor hereby irrevocably and unconditionally agrees and consent to the Bank commencing separate proceedings and enforcing other remedies and exercising any other rights which the Bank may have against the Chargor or the Guarantor prior to or simultaneously with or without having exhausted its rights to sell or to proceed against the said Land or to realise its security under this Charge.

[19] Accordingly, the position in law presently is one that should rightfully be construed as being settled, in that there is no fresh cause of action available to the chargee to claim the recovery of any shortfall after the sale of the charged property. It cannot be denied that the bank certainly has the right to recover the shortfall but that right of recovery *in personam* accrues from the date of default and thus subject to the applicable limitation period, is six years under s. 6 of the Limitation Act 1953. Separately, the foreclosure proceedings, being an *in rem* action, is subject to s. 21 of the Act which bars any order for sale beyond the limit of 12 years, also from the date of default. The cause of action for both the claim for the outstanding loan and the foreclosure proceedings commences from the date of default. (see further below on the relevance of Form 16D for the latter).

[20] The unreported case of *CIMB Bank Bhd v. Spectrum Crest Sdn Bhd & Anor* (Suit No D-22-2232-2008) [2011] 1 LNS 46 cited by the appellant held that the limitation period of 12 years under s. 21(1) of the Limitation Act 1953 started to run from the expiry of the time specified in the letter of demand to claim the shortfall after the disposal of the shares charged under a memorandum of deposit securing the loan. It is observed however, that this case followed *Tan Kong Min* and did not refer to the *ratio* of the Federal Court judgment in *Chan Boi Loi* on the specific issue of the existence or otherwise of a cause of action for the claim of shortfall post foreclosure, even though it followed *Chan Boi Loi* on the position in law that a lender is entitled to pursue all remedies against a borrower simultaneously, contemporaneously or successively.

[21] It is worthy of emphasis that the decision in *Tan Kong Min* which followed *Wan Mohd Wan Ngah* was very much premised on the reasoning then prevailing that a bank could only pursue *in personam* action to recover the debt **after** undertaking the *in rem* action to foreclose the charged property first. In other words, *Wan Mohd Wan Ngah* decided that banks would be required to commence foreclosure proceedings first and sue for the shortfall if any, later, after the auction. This *raison d'etre* was effectively discarded by *Low Lee Lian*, as affirmed by *Chan Boi Loi* which clearly establishes that the bank may seek to pursue its remedies and rights of recovery simultaneously, concurrently or successively. This meant that action should begin to run from the date of the breach and not be postponed until only after the sale of property in foreclosure. As such, *Spectrum Crest* does not support the contention of the appellant.

[22] The appellant also referred, in its written submissions, to the case of *Jigarlal K Doshi v. Resolution Alliance Sdn Bhd & Another Appeal* [2012] 1 LNS 811. It is true that whilst the Court of Appeal reaffirmed the principle enunciated in *Low Lee Lian* that in a foreclosure action, claims of *inter alia*, alleged breaches of contractual obligations or challenges on the calculation of interest under the loan agreement are not relevant, because the court will only under s. 256 of the National Land Code be concerned with the restrictive categories of "cause to the contrary", it also held that the law is clear in that the cause of action by a chargor does not accrue from the date of default of repayment of the loan but instead from the time the chargor fails to remedy the default as specified in the Form 16D notice. The Court of Appeal referred to another of its earlier decision in *Peh Lai Huat v. MBf Finance Bhd* [2009] 5 CLJ 69 where it was clearly stated thus:

> ... the right to exercise the statutory remedy of an order for sale did not arise until after the appellant had failed to remedy the default specified in the Form 16D notice.

[23] However, these two decisions of the Court of Appeal did not make reference to *Chan Boi Loi* as earlier decided by the Federal Court. It has already been stated in the latter the position as to when the cause of action starts to accrue, which is from the date of default of the facility. Notwithstanding the apparent conflicting position on that point of law taken by the appellate courts, for all intents and purposes the failure to remedy Form 16D could also in most cases be construed as the date of default given the practice that does away with the notice of demand, where lenders instead preferring to proceed straight with the issuance of the Form 16D notice. In any event, if the correct legal position is that the cause of action for foreclosure proceedings starts from the default in respect of Form 16D, this still does not assist the case of the appellant in the instant appeal on account of at least two principal reasons.

[24] First, *Jigarial K Doshi* focuses on the action being *in rem* in nature, and held that the limitation period in respect of foreclosure starts from the date of the failure to remedy the default specified in the Form 16D notice. It made no mention of and does not concern itself with the cause of action to recover a shortfall following a foreclosure, which is the focus in the instant appeal. In light of the clear position pronounced by the Federal Court in *Chan Boi Loi*, the recovery of any shortfall or balance outstanding, being an *in personam* action, following an auction, ought, just like the situation in the instant appeal, to have been made within the period of six years from the date of default of the loan in accordance with s. 6 of the Limitation Act 1953.

[25] Secondly, the appellant attempted to foreclose the said property as early as in 2002, as stated earlier in this judgment. Although the application for an order for sale was withdrawn, I agree with the submission of the respondent that the application by the appellant must have been preceded by the issuance of the requisite Form 16D or a demand document to similar effect (despite the absence of separate document of title, this application in 2002 would still be in the form of a foreclosure of the said property) which the respondent must have failed to remedy in any event. This must have been made earlier than the application filed on 16 August 2002. As such the Form 16D (assuming 13 August 2012 being the date of demand notice which was intended to precede the first foreclosure action) relied on by the appellant in the subsequent foreclosure attempt which did result in the sale of the said property on 21 November 2013 could have been issued several years after the time that the cause of action for foreclosure proceedings had actually started to run (*circa* 2002 and earlier), it would certainly not be far-fetched to assume that the subsequent action taken say in 2012 could have also breached the 12 year limitation period since no clear evidence was provided to demonstrate the demand document issued by the appellant which had sought to sell the said property for the first time. In situations where there are more than one Form 16D, case law authorities have established that the

cause of action starts to run from the first Form 16D. In *Bank of Tokyo-Mitsubishi (M) Bhd (dahulu dikenali sebagai Bank of Tokyo Ltd) lwn. Chong Suan Kit & Satu Lagi* [2005] 1 LNS 422; [2007] 4 MLJ 387, the High Court stated quite plainly as follows:

> Kuasa tindakan plaintif di bawah perjanjian gadaian bermula pada waktu Borang 16D dikeluarkan buat pertama kalinya.

[26] This case was also followed in another High Court's decision in *Alliance Bank Malaysia Bhd lwn. Loh Hong Koon* [2013] 1 LNS 596. Despite the absence of Form 16D notice then (because the separate title to the said property had yet to be issued), I would construe the demand made to activate the foreclosure of the said property in the first attempt to have the same effect as a Form 16D for the purposes of the application of this principle because the action of foreclosing properties secured under the loan agreement cum assignment arrangement would similarly be *in rem* in nature and subject to the same limitation period of 12 years as applicable to action to sell properties subject to a charge on land under s. 21 of the Limitation Act 1953. In the case of *Malayan Banking Berhad v. Zahari bin Ahmad* [1987] 1 LNS 136; [1988] 2 MLJ 135, Mohamed Dzaiddin J (as he then was) held that in the absence of a separate document of title, the loan agreement and deed of assignment in that case created an equitable charge in form and substance which was recognised by the National Land Code, and granted an order for the sale of the charged property under O. 83 of the Rules of the High Court 1980. It is noteworthy that reference was also made in that case to the judgment of Salleh Abas CJ (Malaya) (as he then was) in the Federal Court case of *Mahadevan Mahalingam v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230; [1984] 1 MLJ 266 which held that the ambit of s. 21 of the Limitation Act 1953 encompasses equitable charges as well. The relevant part of the judgment reads as follows:

> For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge' in place of Torrens mortgage. Thus, when section 21(1) of our Limitation Act speaks of a 'mortgage', it must mean a 'charge' as understood and provided for in Part Sixteen of our National Land Code (see *Haji Abdul Rahman & Anor v. Mahomed Hassan* [1917] AC 209). *That being the case, the words 'other charge on land' in the section, in our view, must mean other types of encumbrances to which the land is subjected. These could be an equitable charge* or a lien, statutory or equitable, which arise as a result of depositing a title with the lender. (emphasis added)

[27] For completeness, I should add that the LACA in the instant appeal can also be characterised as an absolute assignment where the rights, title, and interest of the respondent in respect of the said property under the sale and purchase agreement were "absolutely assigned" (as appeared in the LACA executed by the appellant and the respondent in the instant case) and transferred to the appellant assignee. The Federal Court in the cases of *Chuah*

Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917; [1998] 3 MLJ 97 and *Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; [2002] 2 MLJ 513 have held that absolute assignments created equitable mortgages.

[28] These are equitable mortgages of the chose in action arising out of the relevant sale and purchase agreement where assignment has the effect of transferring the legal right in the chose in action pursuant to s. 4(3) of the Civil Law Act 1956. Failure of the assignor borrower to remedy a notice of default entitles the assignee to sell the property even without the necessity of obtaining a judicial order. For the purposes of this judgment however, even if the LACA is deemed to be an equitable mortgage, in light of the Limitation Act 1953, I find no good reason to exclude equitable mortgage from the term "mortgage" found in s. 21. As such the 12 year limitation period would similarly apply as well.

[29] In any event, the instant case is more concerned with a claim for balance outstanding, which is one in the nature of an *in personam* action, the limitation period, as prescribed by s. 6 of the Limitation Act 1953, is six years. The issue of the limitation not having been pleaded in the foreclosure proceedings in my view is immaterial for the focus of this appeal is the subsequent claim for the shortfall, in respect of which the issue of limitation had clearly been pleaded by the respondent. In view of the now incontrovertible position in law that the cause of action to initiate such a claim commences from the default of the borrower to remedy a demand and is not postponed until after foreclosure action has been taken, since the date of the first letter of demand unremedied by the respondent borrower in evidence was 19 October 2001, the action filed in Sessions Court on 27 March 2015 to recover the shortfall post auction is therefore far exceeding the six year limitation period (or even the 12 year period; not that it is applicable) and is consequentially plainly time barred. The appellant's action must thus necessarily fail.

[30] A claim which is statute barred is an established ground for striking out on the basis of it being frivolous, vexatious and an abuse of the process of the court (see for instance the Court of Appeal's decision in *BPI International Finance Ltd v. Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 CLJ 599; [2009] 4 MLJ 821 and the Federal Court's decision in *Tasja Sdn Bhd v. Golden Approach Sdn Bhd* [2011] 3 CLJ 751). It is settled law that for cases impaired and barred by the Limitation Act 1953 such as the present, the test of the pleading being on the face of it "obviously unsustainable" as enunciated in the leading authority of the Supreme Court's judgment in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 would readily be fulfilled. As such, I have no hesitation in holding that the action filed by the appellant in the instant case had been correctly struck out by the Sessions Court.

A

Conclusion

[31] In conclusion, in light of the foregoing reasons, I find that the respondent has successfully on a balance of probabilities proven his case to have the action filed by the appellant for recovery of the balance outstanding to be struck out under O. 18 r. 19 by reason of the action being barred by the Limitation Act 1953, and as well supported by established case law authorities on the subject of striking out applications. I therefore affirm the decision of the Sessions Court in striking out the action by the appellant and accordingly dismiss this appeal.

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